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No. 93-1311

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT GEORGE BURCHILL,
Petitioner

v.

DOUGLAS KISH, et al.,
Respondent

On Petition For Writ of Certiorari
to the United States Court of Appeals
For The Third Circuit

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the United States District Court for the Eastern District of Pennsylvania properly exercise its discretion in dismissing Petitioner's complaint due to his flagrant failure to comply with the Court's Orders?

Did the United States Court of Appeals for the Third Circuit properly exercise its discretion in affirming the Order of the District Court and taxing costs against the Petitioner, a licensed attorney, pursuant to Rule 39 of the Rules of Appellate Procedure?

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RESPONDENTS BRIEF IN OPPOSITION

Respondents, Steinberg, Waldron and the Lehigh County District Attorney's Office respectfully requests that your Honorable Court deny the Petition for a Writ of Certiorari seeking review of the Judgement Order of the United States Court of Appeals For The Third Circuit, No. 93-1438, which affirmed the judgment of the district court

entered April 6, 1993, in No. 92-2776, and taxed costs against the Petitioner.

The Petitioner has not alleged any reasons for the Supreme Court to exercise its judicial discretion pursuant to Rule 10 of the Supreme Court Rules. Additionally, the Third Circuit has not rendered a decision in conflict with a decision of any other court.

COUNTERSTATEMENT OF THE CASE

On or about May 13, 1992, the Petitioner, Robert George Burchill, Esquire, filed a pro se complaint apparently alleging violations under the Federal Civil Rights Act, 42 U.S.C.A. Section 1983, with reference to Sections 1981, 1982, 1985, and 1988 as well. No action was undertaken by Petitioner until Respondents received complaints in the mail during the month of September. The underlying action surrounded the Petitioner's arrest on May 13, 1990, and

subsequent conviction following a jury trial on March 9, 1992, in state court[1]. The Petitioner's appeal on the state charges was dismissed by the Superior Court due to his failure to file a brief. A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania is pending.

On October 5, 1992, Judge Van Antwerpen entered an Order directing Petitioner to file a response to Motions to Dismiss filed by Dr. Paul Gross and Allentown Hospital/ Healtheast, Inc. Petitioner filed untimely responses to those motions.

On November 9, 1992, Judge Van Antwerpen, upon consideration of Petitioner's "Motion to Enlarge Response Time", entered an Order requiring Petitioner

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[1] An excerpt of the facts which led to Petitioner's arrest and which was submitted by way of affidavit to the United States District Court for the Eastern District of Pennsylvania in Support of a Motion for Summary Judgment is found in Appendix A-1.

to file a response by November 23, 1992, to a Motion to Dismiss and Motion for Summary Judgment filed by Respondents Robert L. Steinberg, District Attorney of Lehigh County, Kelly Waldron and the Lehigh County District Attorney's Office on October 21, 1992. On or about December 3, 1992, Petitioner filed untimely responses to those motions.

On December 8, 1992, Judge Van Antwerpen entered an Order directing Petitioner, a pro se attorney, to "file proper responses to [two Motions to Dismiss]". The Order explains that such information is necessary to aid the Court "in understanding the legal basis of [Petitioner's] claim". Petitioner was provided with "twenty-one (21) days [from] the date of [that] Order" to file a proper response to the Motions to Dismiss filed by the County of Lehigh and Clyde R. Bower, or "the case will be dismissed by the Court with prejudice". A response to one of

those motions was untimely filed on January 4, 1993.

On January 5, 1993, Judge Van Antwerpen entered a similar Order directing Petitioner to "file a proper response" to a Motion to Dismiss filed by Douglas Kish, Scott R. Rehrig, Michael Harbove, Donald K. MacConnell, Arthur Spitko, Thomas Toth, South Whitehall Police Department, and South Whitehall Township.

Petitioner filed a "Motion to Enlarge Time" and on January 15, 1993, Judge Van Antwerpen extended the time for response until February 5, 1993. The Order further reflects that "no extensions will be permitted". Even though a final deadline was established, Petitioner failed to file a response until February 11, 1993.

On February 22, 1993, Judge Van Antwerpen entered a seven (7) page Order granting various motions of appellees "without prejudice to [Petitioner's] right to plead

over within twenty-one (21) days of the date of this Order". The Order "expects and directs that [Petitioner] shall and will drop all causes of action which are improper or which lack merit, and file a timely new proper pleading asserting any remaining causes of action within twenty-one (21) days of the date of this Order". The Court, following a review of various aspects of civil rights caselaw, also issued a warning to Petitioner, and indicated that it "will impose substantial monetary or other sanctions for any causes of action in an Amended Complaint which are brought in bad faith".

On March 9, 1993, Judge Van Antwerpen, upon consideration of Petitioner's "Motion to enlarge Time", ordered that the amended complaint be filed "within twenty-one (21) days of the date of this Order or this case will be dismissed with prejudice. No further extension will be permitted". Petitioner, in

total disregard of that Order, failed to file a timely amended complaint, and instead filed an amended complaint on April 8, 1993.

As a result, on April 5, 1993, Judge Van Antwerpen dismissed Petitioner's case with prejudice as to all defendants. On or about April 17, 1993, Petitioner then filed a "Motion to Obtain Relief from Judgment" which displays what can at best be described as a cavalier attitude to the Court's instructions. Thereafter, on May 17, 1993, the Court entered an Order dismissing the motion due to appellant's appeal to the Third Circuit Court of Appeals.

On November 12, 1993, the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the judgment of the district court and taxing

costs[2] against Petitioner. On December 16, 1993, Petitioner's "Petition for Rehearing" was denied. On January 18, 1994, the Third Circuit denied Petitioner's "Motion for Stay of Mandates".

SUMMARY OF REASONS FOR DENYING THE WRIT

The Petitioner, who is a licensed attorney acting pro se, not only failed to forward his complaint to the Respondents from May until September of 1992, but disregarded numerous deadlines imposed by the Court. Untimely, on April 5, 1993, after failing to timely file an amended complaint, Judge Van

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[2] The "costs imposed pursuant to Rule 39 were in favor of Douglas Kish et al., Brief $105.78 and Paul K. Gross, M.D., Brief and Supplemental Appendix $197.40. Rule 39 defines "costs" as including normal administrative costs such as those incurred in preparing the record, printing fees, and the like. See McDonald v. McCarthy, 966 F.2d 112, 116 (3rd Cir. 1992).

Antwerpen dismissed with prejudice Petitioner's action which arises from his arrest and conviction in state court. It should be noted that while a Petition for Allowance of Appeal is pending in the Supreme Court of Pennsylvania, the Superior Court dismissed Petitioner's appeal due to his failure to file a brief. Therefore, Petitioner has repeatedly disregarded deadlines imposed by the state and federal courts.

The decision to dismiss a complaint for failure to comply with court orders rests in the sound discretion of the trial court, and is reviewable only for an abuse of discretion. The decision in Mindek v. Rigatti, 964 F.2d 1369 (3rd Cir. 1992) reviews the various responsibilities prior to dismissal, but also gives "great deference" to the Court which has had contact with the litigant. The Court in Mindek recognizes various reasons, including policy ones, to

permit the trial court to implement the proper sanction for repeated failures to comply with court orders.

The Court also suggested that Paulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3rd Cir. 1984) is not to be mechanically applied nor must all factors be satisfied. However, utilizing Paulis it is apparent that the Court properly exercised its discretion. The responsibility for the dismissal rests firmly with Petitioner, who as an attorney, should be treated differently than other pro se litigants.

ARGUMENT FOR DENYING THE WRIT

A. THE COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING APPELLANT'S COMPLAINT DUE TO HIS FLAGRANT FAILURE TO COMPLY WITH THE COURT'S ORDERS.

The Petitioner, who is a licensed attorney representing himself, disregarded the deadlines imposed by the Court throughout the proceedings. In essence, he treated

deadlines as guidance not requirements. When Judge Van Antwerpen no longer tolerated such conduct and dismissed the complaint, Petitioner alleged unfair treatment or ambiguous orders. If patience is a virtue the Court exercised the utmost restraint in not dismissing the complaint earlier[3]. A review of the complaint and untimeliness of responses discloses either a lack of understanding or a total disregard for the Federal Rules of Civil Procedure. Such conduct justified an involuntary dismissal pursuant to F.R.C.P. 41(b).

The district court has the inherent power to enter a sua sponte order of dismissal. Link v. Wabach RR, 370 U.S. 626, 630, 82 S.Ct. 1386, 1388, 8 L.Ed.2d 734 (1962); Hewlett v. Davis, 844 F.2d 109 (3rd Cir.

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[3] "If the Court were a camel with a shattered vertebrae, plaintiff's first amended complaint is the straw which broke it." Sweeney v. St. Joseph's Hospital, 769 F.Supp. 747, 749 (M.D. Pa. 1991).

1988); Smith v. C.I.R., 926 F.2d 1470 (6th Cir. 1991). Such a decision rests in the discretion of the trial court and is reviewable only for an abuse of discretion. Hewlett v. Davis, 844 F.2d at 114. In this case, Respondents acted to dismiss Petitioner's complaint, and even after the Court warned him, not only did Petitioner fail to comply with the time requirements, but also the procedural outline provided by the Court in its February 23, 1993 order.

In Mindek v. Rigatti, 964 F.2d 1369 (3rd Cir. 1992) which involved a pro se Section 1983 action alleging excessive force and an unconstitutional search, the Third Circuit recognized that "[d]istrict court judges, confronted with litigants who flagrantly violate or ignore court orders, often have no appropriate or efficacious recourse other than dismissal of the complaint with prejudice". While Paulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3rd Cir.

1984) outlines the factors to be utilized in evaluating the propriety of dismissals, the Court in Mindek v. Rigatti, supra. recognized that "Paulis did not provide a magic formula... Not all of the Paulis factors need be satisfied in order to dismiss a complaint. Instead, the decision must be made in the context of the district court's extended contact with the litigant. Ultimately, the decision to dismiss constitutes an exercise of the district court judge's discretion and must be given great deference by this Court - a court which has had no direct contact with the litigants and whose orders, calendar, docket and authority have not been violated or disrupted". 964 F.2d at 1373.

The Court in Mindek, supra. citing and quoting from National Hockey League v. Metropolitan Hockey Club Inc., 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1975) offered the following insight from that opinion on

the discretion of the trial court:

> [t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.
> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Id. at 642-43, 96 S.Ct. at 2780-81.

While Paulis is not to be mechanically applied, it is apparent that utilizing such a

formula the district court properly exercised its discretion. The Petitioner, though pro se, is an attorney and his personal responsibility is far greater than the average pro se litigant. In Jourdan v. Jabe, 951 F.2d 108 (6th Cir. 1991) a pro se litigant's action was dismissed not because of "inartful pleading or any lack of legal training, but rather because he failed to adhere to readily comprehended court deadlines of which he was well aware. That he comprehended their significance is evidenced by his having sought there extension". Likewise, Petitioner requested extensions styled as "Motions to Enlarge Time" and was aware of his "obligation to proceed", but concluded the Court's orders were subject to his own timetable. Petitioner was personally responsible for the dismissal with prejudice of his complaint.

The prejudice to the Respondents is explained clearly in Sweeney v. St. Joseph's

Hospital, supra. For example, new factual allegations well over a year after the filing of the complaint will require an answer, the amended complaint will result in new motions to dismiss and responses, and this matter will fall into the same pattern that has previously existed. Compliance by Respondents, delay and disregard by Petitioner.

The history of Petitioner's case is also marked by dilatoriness. A complaint was filed in May of 1992, but no action was taken by Petitioner to forward the complaints until September of 1992. Thereafter, deadline after deadline was missed, even when no further extensions were specified. It can only be inferred that such actions were also willful[4].

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[4] The district court, though warning appellant that monetary sanctions were possible, ultimately dismissed the action. The decision not to impose monetary sanctions and simply "march the kings horses up the hill" again in the future, Mindek, 964 F.2d at 1371 falls squarely in the court's discretion.

A review of the complaint, as well as the motions to dismiss, provide insight into the allegations, and disclose that the claim against the Respondents Steinberg, Waldron and the Office of the District Attorney, as well as the other Respondents, is not meritorious, but instead frivolous. The district court in its February 22, 1993, Order even warned Petitioner against actions brought in bad faith, and which lack merit. The amended complaint ultimately filed failed to comply with the deadline imposed and neglected to set forth allegations in separate courts. Also, the suppression and trial allegations, themselves, were rejected by the state courts both in pre-trial and post-trial motions. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

Petitioner did not even timely file his brief to the Third Circuit Court of Appeals, and his "Motion Regarding Time Enlargement"

denied responsibility for his misinterpretation of the requirements of the Court.

The reasoning in Mindek best sums up the justification for dismissing this case:

> We cannot even hope to quantify the extent to which cases such as the one before us clog our judicial system and interfere with the ability of diligent litigants to obtain prompt judicial resolution of their disputes. To overcome that interference, we must discipline ourselves not to engage in Monday-morning-quaterbacking which second-guesses conscientious district court judges. It is the district court judge who must strive to manage his or her calendar efficiently and, in so doing, may find it necessary to dismiss a litigant's complaint as a sanction for repeated failure to satisfy court orders.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition should be denied.

DATED: March 9, 1994

Respectfully submitted,

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APPENDIX

EXCERPTS OF MOTION FOR SUMMARY JUDGMENT REVIEWING FACTS RESULTING IN PETITIONER'S ARREST

On the said evening, Cpl. Douglas Kish and Officer Scott Rehrig of the South Whitehall Police Department responded on two occasions to 2120 Latta Street in South Whitehall Township. Their initial response was necessitated due to a report of shots being fired in the area. Initially, when they responded, they neither observed nor heard anything. However, at 10:18 p.m. a little less than two hours later, they received a report "that there were shots being fired from that particular address". While the officers were responding, they received additional information of a woman screaming.

The officers, upon their arrival, exited their vehicles and approached the defendant's